



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 13, 1996

Mr. Bret Bray
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR96-1440

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100595.

The Texas Department of Transportation (the "department") received a request for all files concerning the investigation of Federated Super Stores. You claim the requested information is excepted from required public disclosure by sections 552.103 and 552.108 of the Government Code. You have submitted a representative sample of the documents at issue.¹

You argue first that the requested documents are protected by section 552.108 of the Government Code. You explain that the documents relate to the filing of a complaint and an enforcement proceeding with the department's Motor Vehicle Division. You state that the department must investigate complaints and enforce the Texas Motor Vehicle Commission Code, its rules, orders, and decisions. Section 552.108 applies to records created by an agency, whose primary function is to investigate crimes and enforce the criminal laws. Open Records Decision 493 (1988). It generally does not apply to the records created by an agency whose chief function is essentially regulatory in nature.

¹ In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

V.T.C.S. art. 4413(36), § 3.01-6.07; Open Records Decision No. 199 (1978). We do not believe that the department's material is a "record of a law enforcement agency" for the purposes of section 552.108. See Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 287 (1981); *but see A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 677 (Tex. 1995) (Comptroller could withhold audit papers to protect tax law enforcement interest). Thus, the requested documents may not be withheld pursuant to section 552.108.

You next argue that the requested information is excepted from disclosure by section 552.103. To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

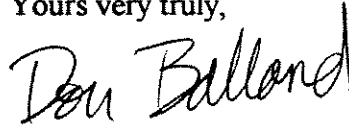
The department is authorized to investigate and may assess penalties for violations of the Motor Vehicle Commission Code. V.T.C.S. art. 4413(36) § 3.01-.09. The department's hearings are subject to the Administrative Procedure Act. *Id.* at § 3.03. In this instance, the department has supplied this office with information which shows that an investigation is pending, and that the department may take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the department are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 100595

Enclosures: Submitted documents

cc: Mr. Wm. David Coffey, III
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(w/o enclosures)